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No. 410

In the Supreme Court of the United States

OCTOBER TERM, 1967

GARY DUNCAN,

Appellant,

v.

STATE OF LOUISIANA,

Appellee.

On Appeal from the Supreme Court of Louisiana

APPLICATION FOR REHEARING

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

WILLIAM P. SCHULER,
Second Assistant Attorney General.

(Mrs.) DOROTHY D. WOLBRETTE,
Assistant Attorney General.

LEANDER H. PEREZ, JR.,
District Attorney,
Twenty Fifth Judicial District,
State of Louisiana.

OF COUNSEL:

LAWRENCE L. McNAMARA,
Special Counsel.

L. K. CLEMENT, JR.,
Assistant Attorney General.

JOHN M. CURRIER,
Assistant Attorney General.

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APPLICATION FOR REHEARING

Petitioner prays that this Court grant a rehearing of its decision of May 20, 1968, reversing the decision of the Louisiana Supreme Court in this case.

REASONS FOR GRANTING REHEARING

I.

The plurality opinion holds that the right to jury trial in "serious criminal cases" in state courts is required by the Sixth and Fourteenth Amendments but shrouds in ambiguity the criteria which a state must use to determine what is a serious criminal case as

distinguished from a petty offense not requiring jury. The opinion merely states on page 14 that the penalty authorized for a particular crime is of major relevance in determining whether it is serious; and that a two year maximum penalty requires a crime to be considered serious (pages 16-17). The opinion admits that the boundaries of the petty offense category have always been ill defined, if not ambulatory (page 15). Yet the opinion flatly refuses to settle the exact location of the line between petty offenses and serious crimes, although it adds to the confusion by hinting on pages 13-14, footnote 30, and page 16 that a maximum penalty of one year may be permissible for the petty offense category, while indicating on pages 14 and 16 that six months may be the limit for the petty offense category.

Since this Honorable Court is now supervising state criminal procedure under the mandate of the Sixth Amendment, it is submitted that the efficient administration of criminal justice in state courts demands a clear definition by this Court of the line of demarcation between petty offenses for which a state need not provide jury trials and serious criminal cases which require jury trials.

II.

The plurality opinion leaves in doubt whether a twelve-man unanimous jury is necessary for the trial of "serious criminal cases". Footnote 30 on page 13 apparently deals with the question without answering it. (See also concurring opinion of Justice Fortas.) It

is erroneously stated in Footnote 30 that only in Oregon and Louisiana can a less than unanimous jury convict for an offense with a maximum penalty greater than one year.

In Florida, *six-man juries* are provided for *all noncapital* cases. Fla. Stats. Sec. 913.10(1); 1967 Fla. Rules of Crim. Proc. Rule 1.270, Vol. 33 Fla. Stats. Anno.

In South Carolina, *six-man juries* are provided for *all felonies* except murder, manslaughter, rape, arson, burglary, bribery and perjury. S.C. Code Title 15, Sec. 15-612, Sec. 15-618 (1962).

In Texas, *nine out of twelve* jurors may render a verdict in all criminal cases below the grade of felony. Art. V, Sec. 13, Texas Constitution; Art. 37.02, Texas Code of Criminal Procedure. Such cases are not limited to one year's maximum imprisonment. See, Texas Penal Code, Arts. 47, 460, 466 a Sec. 1,530.

In Utah, *eight man juries* are provided for *all noncapital felonies*. Utah Code Anno. Title 78, Secs. 78-46-5 (1953).

In Puerto Rico, nine out of twelve jurors are required to convict of a felony. Art. II, Sec. 11, Puerto Rico Constitution; *People v. Miranda*, 79 D.P.R. 667 (1956).

While indicating in Footnote 30 on pages 13-14 that crimes carrying maximum one year sentences need not be tried by twelve man unanimous juries under the Sixth Amendment, the opinion ignores *D.C.*

v. Colts, 282 U.S. 63, which holds that regardless of the brevity of the penalty, if the nature of the offense is serious, it requires the Sixth Amendment twelve-man unanimous jury. Thus, even in those states in which less than twelve-man unanimous juries are restricted to crimes carrying a maximum penalty of one year or less, state criminal process will be affected insofar as those crimes are not considered petty within federal standards. For example the crime of reckless driving was held in *D.C. v. Colts, supra,* to require a twelve man unanimous jury even though the maximum penalty was only thirty days.

Since this Honorable Court is now supervising state criminal procedure under the mandate of the Sixth Amendment, it is submitted that the efficient administration of criminal justice in state courts demands an end to guessing games and a clear answer by this Court to the question whether due process requires a twelve man unanimous jury for the trial of "serious criminal cases".

III.

The plurality opinion remands this case to the lower court for proceedings not inconsistent with the opinion. Yet the opinion does not answer the vital question whether the lower court must provide a twelve man unanimous jury, together with all the other rigid, arbitrary incidents of a federal court jury trial. How is Louisiana to proceed consistently with this Court's mandate, when this Court refuses to make that mandate clear?

IV.

Without any basis in prior jurisprudence or in logic, the plurality opinion discards the "fundamental fairness" test as determinative of whether procedural due process requires jury trial in state court. See particularly page 4, note 14, and the concession on page 13: "We would not assert, however, that every criminal trial held before a judge alone is unfair." Although the plurality opinion did not find that the defendant, Duncan, was not accorded a fair and impartial hearing, it reversed his conviction.

Other Sixth Amendment rights which have been applied to the states by this Court have been found necessary to the substance of a fair hearing. *Powell v. Alabama*, 287 U.S. 45; *In re Oliver*, 333 U.S. 257; *Gideon v. Wainwright*, 372 U.S. 335; *Pointer v. Texas*, 380 U.S. 400; *Klopfer v. North Carolina*, 386 U.S. 213; *Washington v. Texas*, 388 U.S. 14. (See dissenting opinion, pages 8, 16).

The plurality opinion has discarded the fairness test in favor of a new test: whether the particular right is "fundamental to the American scheme of justice" (p. 4), or (as variously put in other portions of the opinion) "fundamental in the context of the criminal processes maintained by the American States" (pages 5, note 14) or required by the "deep commitment of the Nation to the right of jury trial" (page 11).

The new "fundamental to the American scheme" test is a euphemism for the imposition of national

uniformity because the major factor used to determine "the American scheme" is what procedure the federal courts and a majority of the states follow. Thus, if the crime of disorderly conduct was subject to bench trial in federal courts and in thirty of the fifty states today, such a procedure would be "fundamental to the American scheme". If, however, in a few years, because of legislative change, only ten states remained which tried disorderly conduct without a jury, these states would no longer be following "the American scheme" and their procedure would be unconstitutional. According to the plurality opinion's new test, state minority views in criminal procedure cannot be tolerated under the constitution, and the rules of procedure desired by the majority must be imposed on the minority.

This new concept created by the plurality opinion is alien to and destructive of our republican system of "checks and balances."

V.

The plurality opinion on page 15 justifies denying petty offenders jury trials because "the possible consequences" to defendants from convictions for petty offenses are "insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications."

In the name of feasibility and expediency, petty offenders are denied the jury safeguard which the plurality opinion deems fundamental for serious of-

fenders to protect them from "government oppression", "biased judges responsive to the voice of higher authority", "arbitrary law enforcement", and "the corrupt prosecutor". (pages 10-11)

If juries are required to protect serious offenders from official oppression, corrupt prosecutors, and biased judges, then petty offenders who constitute the largest group of lawbreakers, need the same protection.

The result of the plurality opinion is that "liberty" in the due process clause is restricted to the liberty of major offenders.

The Court is in error, in holding a right which can be denied to petty offenders on the ground of expediency, is fundamental to due process. If it is fundamental to "one," it is fundamental to "all".

VI.

The plurality opinion's cursory history of jury trial is inaccurate and merely an attempted rationalization of the result ultimately reached in the opinion.

Despite the admission (page 8, note 20) that the framers of the Sixth Amendment did not intend the Sixth Amendment jury trial right to bind the states, the opinion concludes that history shows that jury trial is fundamental to the American scheme of justice!

Historically the jury trial right has been subject to legislative diminution in England and in state courts in response to the necessity of easing the burden

of jury trial and crowded court dockets. No satisfactory definition has ever been given of the type of so-called "petty crime" historically subject to bench trial, because historically no such definition has ever existed. (Compare the plurality opinion's concession on page 15 that "the boundaries of the petty offense category have always been ill defined.") For reasons of expediency, the number and kind of nonjury offenses increased through the centuries without reference to any unifying consideration distinguishing the type of offense subject to bench trial.

The underlying principles demonstrated by the history of jury trial are the necessity for flexibility in diminishing the general right to jury trial in the interest of efficiency and the lack of any consistent standards distinguishing nonjury crimes from serious crimes.

Despite the fact that history fails to support a clear distinction between nonjury offenses and serious crimes, and despite the fact that this Court itself is unable to make such a distinction, the plurality opinion fashions a constitutional mandate for jury trial around this questionable distinction and makes it binding on the states.

It is submitted that a valid distinction between serious crimes and petty offenses is a prerequisite to a holding that jury trial is constitutionally required in state courts for serious crimes but not petty offenses. It is further submitted that in the absence of such a distinction, the holding of the plurality opinion is based on a fallacy.

Neither reason, logic nor law dictates that a state should be required to equate its penalties for "petty offenses" (still undefined) subsurvient to those crimes defined by another sovereign, namely the federal government.

CONCLUSIONS

For the reasons set forth above it is respectfully urged that a rehearing be granted and that upon such rehearing appellant's conviction and the judgment of the state court below be affirmed.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

WILLIAM P. SCHULER,
Second Assistant Attorney General.

(Mrs.) DOROTHY D. WOLBRETTE,
Assistant Attorney General.

LEANDER H. PEREZ, JR.,
District Attorney,
Twenty Fifth Judicial District,
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OF COUNSEL:

LAWRENCE L. McNAMARA,
Special Counsel.

L. K. CLEMENT, JR.,
Assistant Attorney General.

JOHN M. CURRIER,
Assistant Attorney General.

CERTIFICATE

I, William P. Schuler, a member of the Bar of the United States Supreme Court, do hereby certify that the above and foregoing application for rehearing is presented in good faith and not for delay.

WILLIAM P. SCHULER

CERTIFICATE OF SERVICE

I, William P. Schuler, a member of the Bar of the United States Supreme Court, do hereby certify that a copy of the above and foregoing petition for rehearing has been served on counsel for appellant:

Richard Sobol,
606 Common Street,
New Orleans, La. 70130.

Anthony G. Amsterdam,
University of Pennsylvania Law School,
3400 Chestnut Street,
Philadelphia, Penn.

Alvin J. Bronstein,
c/o Institute of Politics,
Kennedy School of Government,
Harvard University,
78 Mt. Auburn Street,
Cambridge, Mass. 02138.

Donald Juneau,
1006 Baronne Building,
New Orleans, La. 70112.

by placing same in the United States Mail, properly addressed to them, with sufficient postage thereto annexed.

New Orleans, Louisiana, this _____ day of _____ 1968.

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WILLIAM P. SCHULER